

Subject: FTC Ad Substantiation Program

Issue: Should the FTC eliminate or clarify its advertising substantiation requirements.

Background: The origins of the ad substantiation program date back to 1970 when the FTC received a petition for rulemaking to require advertisers to make scientific information supporting advertising claims available to the FTC and to the public.

In 1972, in the now famous Pfizer case, the Commission announced that an ad could be "unfair" though not false, if it lacked "a reasonable basis" for the stated claims. Even though the FTC dropped the Pfizer complaint, the case has been looked upon as a precedent of allowing the FTC to issue a complaint against a company who could not prove that claims were substantiated at the time the claims were made. In other words, the Commission said that advertising claims may be actionable as "unfair," even if true, if made without a reasonable basis.

Soon after becoming Chairman of the FTC, Jim Miller questioned the value of the FTC's substantiation program, and on March 11, 1983, the FTC's request for comments on the program was published in the Federal Register.

The notice sought guidance on altering the program while requesting research and specific information from respondents regarding the costs and benefits of the present ad substantiation program and the effect this program and programs of other government agencies had on internal advertising standards and self regulatory bodies.

Status: Comments on the FTC's review of its substantiation program were due on July 15. In its submission, ANA's position is that the FTC should retain its ad substantiation program -- requiring advertisers to have prior substantiation, provided that further available substantiation is admissible if the claim is challenged and provided that new substantiation is admissible on challenged claims which the advertise did not intend to make, but which are nonetheless alleged by the FTC to be implied.

2040942832

ANA also asked that the FTC not seek substantiation either on a "sweep" or case-by-case basis unless having substantial prior reason to believe the claims were deceptive and that the claims made in ads subject to the "sweep" were, in fact, identical.

According to the FCC staff attorney working on this issue, the comments have been read and analyzed and recommendations are expected to be made to the Bureau of Consumer Protection by the end of next month.

After review, BCP will forward the recommendations to the Commissioners.

2040942833